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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

PAUL C. MAGGIO, d/b/a PATCHOGUE NURSING CENTER,
Petitioner,

vs.

LOCAL 1199, DRUG, HOSPITAL AND HEALTH CARE
EMPLOYEES UNION, R.W.D.S.U., AFL-CIO,
Respondents.

LOCAL 1199, DRUG, HOSPITAL AND HEALTH CARE
EMPLOYEES UNION, R.W.D.S.U., AFL-CIO,
Respondents,

vs.

PAUL MAGGIO, d/b/a PATCHOGUE NURSING CENTER,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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62 pp



QUESTION PRESENTED

The New York State Department of Health investigated and found a nurse aide guilty of four separate incidents of patient abuse of elderly nursing home residents ("forcefully struck patient ... in the stomach with ... elbow;" "forcefully pushed the patient against the wall;" "forcefully transferred patient from his wheelchair to his bed [such that] patient struck his head against the headboard;" "forcefully assisted patient ... to turn over in bed [such that] patient struck the bedside rail").

Does an arbitrator's award directing the nursing home to reinstate the nurse aide violate the dominant public policy of both the United States and the State of New York that nursing home residents be safeguarded from acts of physical abuse by those persons charged with their care?

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OPINIONS BELOW

The opinion of the Court of Appeals, which is annexed hereto as Appendix "A," was issued as a summary order and will not be officially reported pursuant to Local Rule 0.23 of that Court. The opinion of the District Court, which is annexed hereto as Appendix "B," is reported at 702 F. Supp. 989. The decision of the arbitrator is annexed

hereto as Appendix "C." The findings of the New York State Department of Health are annexed hereto as Appendix "D."

JURISDICTION

This petition is filed pursuant to 28 U.S.C. §1254(1), within the time allowed by 28 U.S.C. §2101(c), for the issuance of a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit, dated and entered June 13, 1989. That order affirmed a judgment of the United States District Court for the Eastern District of New York confirming an arbitrator's award in favor of respondent Local 1199, Drug Hospital and Health Care Employees Union, R.W.D.S.U, AFL-CIO ("Local 1199").

STATUTES

The principal federal statute involved is 42 U.S.C. §1395i-3. State statutes involved are New York Public Health Law §§12, 12-b, 2803-c, and 2803-d. The pertinent text of these statutes, with references to implementing regulations, is set forth as Appendix "E" hereto.

STATEMENT OF THE CASE

Clifford Ackley ("Ackley"), a nurse aide employed by petitioner, Patchogue Nursing Center ("Patchogue"), was fired by the nursing home after it determined that he had abused and mistreated four patients. In addition to terminating Ackley, the nursing home, as required by

New York Public Health Law §2803-d, reported these incidents of patient abuse to the New York State Department of Health (the "DOH"). As was its statutory obligation, the DOH conducted an onsite investigation within 48 hours of the report and found Ackley guilty of patient abuse with respect to each of the four reported incidents. It made the following findings:

On an undetermined day in the first part of February, 1987 at approximately 4:15 p.m., you forcefully struck patient Mr. Leon Cootner in the stomach with your elbow.

On an undetermined day in the first part of February, 1987 after assisting patient Ms. Florence Cattani from her bed, you forcefully pushed the patient against the wall. You then held the strings of the patient's restraint while the patient stumbled trying to walk away.

On or about February 22, 1987 during the approximate period of time 3:30 p.m. to 5:00 p.m. you forcefully transferred patient Mr. Anthony Ingoglia from his wheelchair to his bed. As a result, the patient struck his head against the headboard of the bed.

On or about February 9, 1987 at approximately [sic] 7:30 p.m., you forcefully assisted patient Ms. Ruth Krause to turn over in bed. As a result, the patient struck the bed siderail with one or both of her arms. (App. D., pp. 40A-41A)¹

¹ References preceded by "App." are to the Appendices attached hereto.

Faced with these findings, Ackley pursued two courses of action: (1) He requested a hearing before the DOH, as was his entitlement under Public Health Law §2803-d(6)(d); and (2) He proceeded to arbitration pursuant to the grievance provisions of the underlying collective bargaining agreement between Patchogue and Ackley's union, Local 1199.

The matter reached the arbitrator first, who refused to consider the DOH findings and chose, instead, to render his own findings. He concluded that Ackley was not guilty of abusing patients Cattani and Cootner, but was "guilty of mistreating patients Ingoglia and Krause as a result of rough handling stemming from carelessness." (App. C., p. 38A). As for the penalty, the arbitrator assessed a one-month suspension without pay and, accordingly, since more than one month had passed from the date of discharge, he ordered Ackley's immediate reinstatement together with back pay.

THE DECISION OF THE DISTRICT COURT

After reviewing the statutory and regulatory scheme, the District Court concluded that it could not discern a "clear legislative intent to place issues of suspected patient abuse outside the jurisdiction of a labor arbitrator", and accordingly felt constrained to disregard the DOH findings and address only the findings of the arbitrator (App. B, p. 17A).

The court then addressed the issue of whether, as a matter of public policy, the arbitrator's findings were nonetheless sufficient to preclude Ackley's re-employment. Applying the analysis articulated in *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, ___ U.S. ___, 108

S. Ct. 364 (1987), the court reasoned that while there was a well defined public policy to protect residents of health care facilities from being subject to physical abuse, the arbitrator's findings did not establish a "link between the policy protecting patients from physical abuse and enforcement of the award" (App. B, p. 21A).

THE DECISION OF THE CIRCUIT COURT

Also relying upon *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 108 S. Ct. 364, 373 (1987), the Circuit Court held:

We find no public policy that is "'explicit' ... 'well defined and dominant'" enough to allow us to reverse the decision of the district court and reverse or vacate the arbitrator's award. Appendix A, p. 2A; emphasis added.

REASONS FOR GRANTING THE WRIT

First, this case presents an important issue not reached in *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 108 S. Ct. 364 (1987), and identified by Justice Blackmun in his concurring opinion as:

[W]hether a court may refuse to enforce an arbitration award rendered under a collective bargaining agreement on public policy grounds only when the award itself violates positive law or requires unlawful conduct by the employer. 108 S. Ct. at 375.

Second, this case presents the issue whether, under

Misco, a court may refuse to enforce an arbitrator's award that violates an "explicit ... well defined and dominant" policy on the ground that such public policy is not "explicit ... well defined and dominant" enough.

In *Misco*, the arbitrator ordered the reinstatement of an employee named Cooper, after finding that his employer failed to prove that he had possessed or used marijuana on company property, notwithstanding that the employee was apprehended on company premises in an atmosphere of marijuana smoke in another's car and that marijuana gleanings were found in his car on the company lot. In seeking to set aside the award, the employer argued that the employee's reinstatement would violate a public policy against the operation of dangerous machinery by persons under the influence of drugs or alcohol. The Court of Appeals agreed.

In reversing, this Court reiterated its prior holdings in *W. R. Grace & Co. v. Local Union 759, Int'l Union of Rubber Workers*, 461 U.S. 757 (1983), and *Muschany v. United States*, 324 U.S. 49 (1945) that a court's refusal to enforce an arbitration award is limited to situations where enforcement would violate "some explicit public policy" that is "well defined and dominant," and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests." 108 S. Ct. at 373, quoting from *W. R. Grace*, at 461 U.S. at 766 and *Muschany*, 324 U.S. at 466.

In holding that this was not such a situation, this Court noted that the Court of Appeals "made no attempt to review existing laws and legal precedents" in order to ascertain whether a well defined and dominant public policy could actually be identified. 108 S. Ct. at 374. It further held that even if such a policy were extant, "the assumed connection between the marijuana gleanings

found in Cooper's car and Cooper's actual use of drugs in the workplace is tenuous at best" and, accordingly, provided an insufficient basis for holding that his reinstatement would actually violate such a public policy. 108 S. Ct. at 374; emphasis added.

This Court reasoned that the mere finding of marijuana gleanings in Cooper's car did not necessarily mean that he had "ever been or would be under the influence of marijuana while he was on the job and operating dangerous machinery," and it was "by no means clear from the record that Cooper would pose a serious threat to the asserted public policy in every job for which he was qualified." *Id.*

In contrast to *Misco*, there is no question but that the rights of the patients of nursing homes to be protected from physical abuse by the employees who are in charge of their care is a "well defined and dominant" public policy rooted in express statutory and regulatory provisions of both federal and New York State Law. *See*, App. E. The Circuit Court lowered the *Misco* standard and held such a public policy not "'explicit' ... 'well defined and dominant' enough to allow [it] to reverse the decision of the district court and reverse or vacate the arbitrator's award" (App. A, p. 2A; emphasis added).

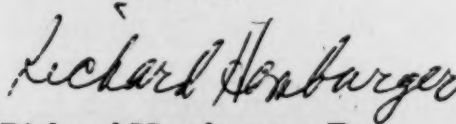
Also in contrast to *Misco*, there is no doubt that Ackley's reinstatement as a nurse aide "would pose a serious threat" to the policy of protecting nursing home residents from physical abuse perpetrated by nursing home employees in charge of their care, such that the likelihood of that policy being violated is not "tenuous at best." After all, enforcement of the arbitration award requires a return to the nursing home of a nurse aide who has been found, after an onsite investigation by the New York State Department of Health, to have forcefully struck one patient

in the stomach with his elbow, forcefully pushed another patient against the wall and forcefully caused injuries to two other patients.

Accordingly, the writ should be granted.²

Dated: Smithtown, New York
August 22, 1989

Respectfully submitted,



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² In the Court below, *amicus curiae* briefs were filed in support of petitioner by the Ombudservice Program of Nassau County, a regional organization founded by the New York State Office of Aging for the purposes of providing certified and trained volunteer advocates to assist nursing home patients, and the New York State Health Facilities Association, Inc., a not-for-profit trade organization whose membership consists of approximately 230 residential health care facilities caring for approximately 35,000 sick and elderly patients throughout New York State.

APPENDIX A

SUMMARY ORDER AND OPINION OF THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT FILED JUNE 13, 1989

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals
for the Second Circuit, held at the United States Court-
house in the City of New York, on the thirteenth day of
June, one thousand nine hundred and eighty-nine.

Present:

HONORABLE ELLSWORTH A. VAN
GRAAFEILAND,
HONORABLE THOMAS J. MESKILL,
HONORABLE RALPH K. WINTER,

Circuit Judges.

Docket No. 89-7142

United States Court of Appeals
Second Circuit

Filed

June 13, 1989

Elaine R. Goldsmith, Clerk

PAUL C. MAGGIO, d/b/a PATCHOGUE
NURSING CENTER,

Plaintiff-Appellant,

v.

LOCAL 1199, DRUG, HOSPITAL AND
HEALTH CARE EMPLOYEES UNION,

R.W.D.S.U., AFL-CIO,
Defendant-Appellee.

LOCAL 1199, DRUG, HOSPITAL AND
HEALTH CARE EMPLOYEES UNION,
R.W.D.S.U., AFL-CIO,
Plaintiff-Appellee,

v.

PAUL C. MAGGIO, d/b/a PATCHOGUE
NURSING CENTER,
Defendant-Appellant.

Appeal from a judgment entered in the United States District Court for the Eastern District of New York, Wexler, J., reported at 702 F. Supp. 989 (E.D.N.Y. 1988), confirming an arbitrator's award in favor of defendant-appellee Local 1199 (the union). Plaintiff-appellant Maggio argues that enforcement of the award would violate public policy, that the arbitrator should have been required to adopt the findings of a state agency in a related matter and that the arbitrator should at least have been required to admit the findings of the state agency into evidence in the arbitration proceeding.

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

The judgment of the district court is **AFFIRMED**.

We find no public policy that is "'explicit' ... 'well defined and dominant'" enough to allow us to reverse the decision of the district court and reverse or vacate the arbitrator's award. *United Paperworkers International Union*

v. Misco, Inc., 56 U.S.L.W. 4011, 4015 (U.S. Dec. 1, 1987) (quoting *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983)). Without such a policy, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.* at 4014; see *Synergy Gas Co. v. Sasso*, 853 F. 2d 59, 64 (2d. Cir.), *cert. denied*, 109 S. Ct. 559 (1988). For the reasons stated by the district court in its opinion, we find no violation of public policy by the arbitrator's award.

We also reject the arguments of appellant and *amici curiae* urging that patients at a nursing home have a fundamental right to be free from bodily harm, and that this right required the arbitrator to admit the decision of the New York State Department of Health into evidence. Not only are there no allegations that patients were in any way precluded from testifying at any stage of either the administrative or the arbitration proceedings, but the arbitrator's decision was "not in bad faith or so gross as to amount to affirmative misconduct." *Misco*, 56 U.S.L.W. at 4014 (citing the Federal Arbitration Act, 9 U.S.C. §10(c)).

We have considered all of appellant's contentions and find them to be without merit.

s / _____
Ellsworth A. Van Graafeiland, U.S.C.J.

s / _____
Thomas J. Meskill, U.S.C.J.

s/

Ralph K. Winter, U.S.C.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

APPENDIX B

MEMORANDUM AND ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK
DATED DECEMBER 4, 1988

MEMORANDUM AND ORDER

CV 88-1352
(WEXLER, J.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PAUL C. MAGGIO, d/b/a PATCHOGUE
NURSING CENTER,

Plaintiff,

-against-

LOCAL 1199, etc., et al.,

Defendants.

CV 88-1793

(Wexler, J.)

LOCAL 1199, etc., et al.,

Plaintiffs,

-against-

PAUL C. MAGGIO, d/b/a PATCHOGUE
NURSING CENTER,

Defendant.

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WEXLER, District Judge

In these consolidated cases the Court must decide whether to confirm or vacate an arbitrator's decision to reinstate and award back pay to an employee. The employee at issue is Clifford Ackley ("Ackley") a member of Local 1199 of the Drug, Hospital and Health Care Employees Union (the "Union"). The employer is Paul C. Maggio ("Maggio" or the "Employer") who operates the Patchogue Nursing Center ("PNC"). In a prior order of this Court permission was granted to the New York State Health Facilities Association ("NYSHFA") to participate in this litigation as *amicus curiae*.

Both the Employer and NYSHFA seek to have the award vacated on the ground that its enforcement would violate the clearly articulated public policies of the state of New York and of the United States of America. Arguing that no such conflict exists the Union seeks confirmation of the award. After outlining the background of the case

the Court will turn to address the parties' contentions.

I. Background

A. Proceedings Before the Commissioner of the New York State Department of Health

On February 23, 1987 Ackley was discharged from his employment as a Nurse's Aide at PNC. The next day Maggio sent a report to the Commissioner of the Office of Health Systems Management of the New York State Department of Health (the "Commissioner") detailing the reasons for Ackley's discharge (the "February 24 Report"). The February 24 Report was sent pursuant to Section 2803-d of New York's Public Health Law, a statute discussed in greater detail below, that requires people such as Maggio to report suspected incidents of "physical abuse, mistreatment or neglect" of persons receiving care in residential health facilities like PNC. See N.Y. Pub. Health L. §2803-d. Although the February 24 Report is not before the Court subsequent events and documents generated after February 24, 1987 make clear that Ackley was discharged because his employer believed that Ackley had physically abused four individuals residing at PNC.

In a letter dated December 9, 1987 a representative of the Commissioner stated that an investigation conducted on February 26, 1987 revealed that sufficient credible evidence existed tending to show that the four alleged acts of physical abuse had indeed occurred. Notwithstanding this finding of patient abuse, the Commissioner declined to exercise his power, pursuant to New York law, to impose a fine on Ackley. Instead, the Commissioner stated that the February 24 Report would remain in the files of the Department of Health and that the December 9, 1987 letter would serve as "an admonishment" for Ackley's conduct.

Shortly after receipt of the December 9, 1987 letter, Ackley's attorney wrote to the Commissioner asking that the record of Ackley's physical abuse of patients be expunged or, in the alternative, seeking a hearing to determine the merits of the charge of physical abuse. In a letter dated February 23, 1988 the Commissioner informed Ackley's attorneys that no reason existed to amend or expunge the findings expressed in the December 9, 1987 letter. Although the February 23, 1988 letter referred to Ackley's right to a hearing the Court is unaware of any effort taken by either side to schedule that hearing.

B. Arbitration Proceeding

At the same time that the foregoing proceedings before the Commissioner were taking place, Ackley exercised his right, pursuant to a collective bargaining agreement entered into between the Employer and the Union, to seek arbitration of the issue of whether Ackley was discharged for cause. Hearings were held before an arbitrator on October 1, 1987, January 26, 1988 and February 25, 1988. On March 30, 1988 the arbitrator rendered his opinion and award (the "Award").

Although the precise issue before the arbitrator — whether or not Ackley was fired for cause — was not discussed in any of the Commissioner's letters, the factual circumstances regarding the firing are identical to those that prompted the issuance of the February 24 Report. Because actual hearings were held before the arbitrator the Award discusses, in much greater detail than any documents generated during the course of the proceedings before the Commissioner, the circumstances of alleged physical abuse. The four patients discussed in the Award are Florence Cattani, Anthony Ingoglia, Ruth Krause and Leon Cootner. Each of these individuals are elderly residents of PNC who require extensive care and

assistance in the activities of daily living.

After reviewing the charges and the testimony of witnesses the arbitrator held that Ackley had not abused Cattani or Cootner. Although the arbitrator found Ackley guilty of mistreating Ingoglia and Krause, he held that such mistreatment was not intentional but was a result of rough handling stemming from carelessness that could be attributed to Ackley's "size, bulk, strength and, at times, being rushed to perform chores." Under these circumstances the arbitrator determined that the appropriate remedy was a suspension period of one month without pay. Since the one month period had elapsed by the date of the Award, the arbitrator held that Ackley was entitled to immediate reinstatement and back pay from March 23, 1987 to the date of the reinstatement. After the submission of post-arbitration memoranda the arbitrator issued a supplemental opinion and award. That supplemental award is dated May 25, 1988 and fixes the amount of back pay at \$11,349.82 plus interest accrued from the date of April 15, 1988 to the date of reinstatement.

II. The Present Motion

As noted above, the Union now moves, on behalf of Ackley, for confirmation of the arbitrator's award. The Employer and NYSHFA oppose the Union's application on the ground that confirmation violates public policy. In the event that this Court confirms the award, the Employer concedes that the amounts fixed by the supplemental award are appropriate.

The public policy argument is two-fold. First, it is argued that the comprehensive state and federal statutory scheme that, among other things, gives the Commissioner broad powers to adjudicate instances of suspected patient mistreatment, leaves labor arbitrators with no

jurisdiction to rule on such matters. Second, it is argued that even if an arbitrator has the power to decide whether mistreatment has taken place, the remedy of reinstatement is unavailable when the arbitrator makes factual findings akin to those made in the present case.

A. General Principles

As a starting point the Court notes that the policy favoring labor arbitration is strong and the circumstances allowing the Court to review the merits of an award are, therefore, narrow. See *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960); 9 U.S.C. §10 (setting forth the limited circumstances allowing a Court to vacate an arbitration award). Although Courts have long recognized their ability to refuse confirmation of an arbitrator's award on the ground that enforcement would violate public policy, the aforementioned bias in favor of labor arbitration has resulted in the rare application of the public policy doctrine. See, e.g., *International Union of Electrical Radio and Machine Workers Local 453 v. Otis Elevator Co.*, 314 F.2d 25 (2d Cir.), cert. denied, 373 U.S. 949 (1963).

In *United Paperworkers Internat'l Union, AFL-CIO v. Misco, Inc.*, 108 S.Ct. 364 (1987), the Supreme Court explained the scope of the public policy exception to enforcement of a labor arbitrator's award. The Court noted that the doctrine has its roots in the common law notion that a court will refuse to enforce a contract that violates public policy because no court will "lend its aid to one who founds a cause of action upon an immoral or illegal act..." *Id.* at 373.

Although the Supreme Court has held the public policy doctrine applicable to labor arbitration cases, it has cautioned against the broad application of the doctrine to

invalidate a labor arbitrator's award. Thus, an arbitrator's award should be found to violate public policy only under those rare circumstances where enforcement will violate a "well defined and dominant" policy. *Id.* at 374. See also *W.R. Grace and Co. v. Local Union 759*, 461 U.S. 757, 766 (1983); *Muscany [sic] v. United States*, 324 U.S. 49, 66 (1945). That policy must be "ascertained 'by a reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *Misco*, 108 S.Ct. at 374 (citations omitted). Once the policy is identified, the party seeking to have the award vacated must show that a sufficient link exists between enforcement of the award and violation of the policy to warrant the refusal to confirm the award. See *Misco*, 108 S.Ct. at 374.

In *Misco*, the Supreme Court reversed a holding of the Court of Appeals for the Fifth Circuit that refused confirmation of a labor arbitrator's award on the ground that its enforcement would violate public policy. There, the employee at issue was found guilty, in a separate criminal proceeding, of possession of marijuana. Although the arbitrator found that the employee was in a marijuana smoke-filled car in the company parking lot, he held that insufficient evidence of drug use on company property existed to warrant the firing. Accordingly, the award ordered that the employee be reinstated.

Because the employee operated heavy, dangerous machinery, the employer argued that the reinstatement violated public policy. The District Court agreed and held that enforcement would violate the public policy against the operation of heavy machinery while under the influence of drugs as well as the public policy evidenced by state criminal laws against drug possession. The Court of Appeals affirmed holding that reinstatement of the employee would violate the policy "against the operation of dangerous machinery by persons under

the influence of drugs or alcohol." *Misco*, 108 S.Ct. at 369, quoting, *Misco, Inc. v. United Paperworkers Internat'l. Union, AFL-CIO*, 768 F.2d 739, 743 (5th Cir. 1985).

After setting forth the narrow circumstances under which the public policy doctrine is to be applied, the Supreme Court reversed the holding of the Circuit Court. First, the Supreme Court noted that the Circuit Court's pronouncement of public policy was in error because the lower court did not refer to existing laws and precedents to establish a "'well-defined and dominant' policy against the operation of dangerous machinery while under the influence of drugs." *Misco*, 108 S.Ct. at 374. Since the policy relied upon was based upon nothing more than "general considerations of supposed public interests" the Court held that it did not constitute the type of policy upon which a court could rest its decision to invalidate an arbitrator's award. *Id.*

The Supreme Court went on to state that even if the lower court's formulation of "public policy" was correct, refusal to enforce the award was nonetheless unwarranted. Fatal to vacation of the award was the lower courts failure to demonstrate a sufficient link between enforcement of the award and violation of the previously identified public policy. See *Misco*, 108 S.Ct. at 374. Specifically, the Supreme Court observed that since any connection between the finding of traces of marijuana in the employee's car and the use of drugs while operating dangerous machinery was "tenuous at best," that link provided an insufficient basis upon which to invalidate the arbitrator's award. *Id.*

B. The Public Policy Argument At Issue in This Proceeding

In support of the argument that enforcement of the

Award would violate public policy Maggio points to both state and federal statutes. Specifically, Maggio relies on: (1) Section 2803 of New York's Public Health Law; (2) sections of New York's Code of Rules and Regulations ("NYCRR") that deal with a nursing home operator's duty to provide qualified personnel and (3) sections of the Federal Omnibus Budget Reconciliation Act of 1987 that deal with nursing home reform. As noted above it is argued that these statutes evidence an intent to place the issue of patient mistreatment beyond the purview of an arbitrator or, in the alternative, that the policy evidenced by these statutes prohibits reinstatement of Ackley under the factual findings of the Award.

i. The Public Health Law

Section 2803-d of New York's Public Health Law sets forth a procedure for the reporting of suspected instances of abuse of persons who receive care in nursing homes like PNC. Under the law certain specified individuals are required to report instances of suspected "physical abuse, mistreatment or neglect" of persons receiving care in residential health care facilities. See N.Y. Pub. Health L. §2803-d (McKinney 1985). The statute further provides that an investigation of the charges is to be carried out by the Commissioner. After the Commissioner's findings are communicated to the individual charged, that person may ask that any adverse findings be expunged from his employment record. Based upon the individual's request, the Commissioner can expunge the record or find that sufficient credible evidence of a violation of the law exists and refuse to expunge the record. After the Commissioner acts upon the request to expunge, the individual has the right to a hearing where the burden of proving the charges is on the Commissioner. N.Y. Pub. Health L. §2803-d(6) (a-d) (McKinney 1985).

Maggio's public policy argument is also based upon Section 2803-c of New York's Public Health Law. That law requires facilities like PNC to "adopt and make public a statement of the rights and responsibilities of the patients who are receiving care in such facilities," and to "treat such patients in accordance with the provisions of such statement." N.Y. Pub. Health L. §2803-c (McKinney 1985). The law provides that the statement of rights contemplated by the statute must include, *inter alia*, the right of every patient: (1) "to receive courteous, fair and respectful care and treatment," N.Y. Pub. Health L. §2803-c(3)(g) (McKinney 1985) and (2) to be "free from mental and physical abuse." N.Y. Pub. Health L. §2803-c(3) (McKinney 1985).

ii. NYCRR

The section of the NYCRR relied upon by Maggio imposes a duty upon the operators of nursing facilities to provide personnel who are qualified to provide services necessary to promote the "health, safety, proper care and treatment" of residents and to ensure that members of the facility's staff "refrain from abusive, immoral or other unacceptable conduct, behavior or language." 10 NYCRR §414.17.

iii. State Law Penalties

The state law penalties that can be imposed for violation of the aforementioned state statutes and regulations are: (1) a penalty of up to one thousand dollars per day for continuing violations of rules promulgated pursuant to the Public Health Law, *see* N.Y. Pub. Health L. §2803(6) (McKinney 1985); (2) penalties of up to one thousand dollars a day for a continuing violation of the provisions of the NYCRR referred to above, *see* 10 NYCRR §732.1; (3) a penalty of up to two hundred and fifty dollars per day

for each violation of the Public Health Law, *see* N.Y. Pub. Health L. §12 (McKinney 1971) and (4) if the violation at issue is deemed wilful [sic], the finding of guilt of the commission of a misdemeanor, *see* N.Y. Pub. Health L. §12-b (McKinney 1971). Specifically, the Commissioner does not have the power to require that a health care employee be fired.

iv. Federal Law

In addition to relying on the aforementioned provisions of state law, Maggio relies on certain provisions of federal law to support the public policy argument. Specifically, Maggio points to provisions of the Omnibus Budget Reconciliation Act of 1987 ("OBRA") that set forth certain requirements for the quality of care provided by nursing facilities. *See* Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, §4201, 101 Stat. 1330-160 (1988) (to be codified at 42 U.S.C. §1395x) (hereinafter cited as "OBRA").

OBRA amends section 1819 of Title 28 of the Social Security Act ("Section 1819") by adding a section entitled "Requirements Relating to Provision of Services." Thus, Section 1819 now provides that a nursing facility "must care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident." §1819(b)(1)(A). On a more specific level, the newly amended Section 1819 discusses required training of individuals who work as nurses aides in nursing facilities. While that portion of the statute sets forth a fairly comprehensive training and evaluation procedure for nurses aides, it will apply to a nurses aide in Ackley's position only as of January 1, 1990. *See* §1819(5)(b). The final portion of OBRA relied upon by Maggio mirrors the "patients rights" provision of state law and requires nursing facilities to protect the right of

each resident to be "free from physical or mental abuse."
§1819(c)(1)(A).

v. Federal Law Penalties

The penalties that may be imposed for violation of the aforementioned sections of OBRA relate primarily to the Federal government's ability to terminate a facility's right to participate in the Medicare program and to impose fines. If a facility is not in compliance with OBRA and the Secretary of Health and Human Services (the "Secretary") finds that the health or safety of residents is in immediate jeopardy the Secretary must appoint a temporary manager of the facility or terminate the facility's ability to participate in Medicare or Medicaid. §1819(h)(2)(A)(i). If a facility is not in compliance with the requirements of OBRA but that non-compliance does not jeopardize the immediate health or safety of residents the Secretary may terminate the facility's ability to participate in Medicare or Medicaid or can: (1) deny payment for new admissions; (2) impose civil penalties of \$10,000 for each day of non-compliance or (3) appoint temporary management to operate the nursing facility. §1819(h)(2)(A)(ii); §1819(h)(2)(B).

C. Would Enforcement of the Award Violate Public Policy?

As noted above, an arbitrator's award will be vacated on public policy grounds only if: (1) the policy relied upon is "well-defined" and "dominant" and (2) a clear link exists between enforcement of the award and violation of the policy. *See Misco*, 108 S.Ct. at 374.

The first policy said to be evidenced by the statutes noted above is a policy vesting the Commissioner with the exclusive right to investigate, review and decide

patient abuse cases in the State of New York. In support of their exclusivity argument Maggio and NYSHFA point to the statutory scheme referred to above and rely on certain case law.

While the Court agrees that the statutes relied upon give the Commissioner the right and, indeed, the responsibility, to investigate instances of suspected patient abuse, the Court cannot agree that the granting of that right necessarily divests a labor arbitrator of the right to rule upon an employee's grievance when it is concerned with such matters. Such a broad ruling would be warranted only if the Court were to find clear legislative intent to place issues of suspected patient abuse outside the jurisdiction of a labor arbitrator. The Court finds no express language evidencing such an intent and cannot glean such an intent from any related legislation.

Although Section 2800 of the Public Health Law provides that the Department of Health shall have the "central, comprehensive responsibility for the development and administration of the state's policy with respect to hospital and related services", N.Y. Pub. Health L. §2800 (McKinney 1985), such language does not necessarily support the exclusivity argument. Indeed, it appears that this language was chosen to centralize the functions to be assigned to the Department of Health in a single state agency. See N.Y. Pub. Health L. §2800, Historical Note (McKinney 1985) (referring to legislation transferring employees from Department of Social Services to Department of Health). In any event Section 2800 refers only to "policy making" and states nothing about vesting the Commissioner with exclusive adjudicatory powers. Thus, the statute does little to demonstrate an intent to make the Commissioner the exclusive arbiter of patient abuse cases.

Maggio and NYSHFA also place great reliance on

Cohoes City School District v. Cohoes Teachers Association, 390 N.Y.S. 2d 53 (1976). There, the New York State Court of Appeals held that an arbitrator could not reinstate a school teacher for a period of time that would ripen into the granting of tenure. The decision to deny reinstatement that would result in the automatic granting of tenure was based upon the Court's view that a school board cannot, as a matter of law, relinquish tenure decisions to an arbitrator. *Id.* at 55. Thus, the Court affirmed the Appellate Divisions' [sic] decision to allow reinstatement but to withhold the granting of tenure for an additional year to allow the school board additional time to evaluate the teacher at issue. *Id.* at 56.

By analogizing a school board's tenure decision to the Commissioner's decisions on physical abuse, it is argued that an arbitrator has no power to rule on cases involving suspected patient abuse. Aside from the fact that *Cohoes* predates controlling Supreme Court authority as outlined in *Misco*, the Court has difficulty accepting the suggested analogy. While a school board has historically retained the right to determine whether or not a teacher should be granted tenure, operators of nursing facilities have not excluded instances of suspected patient abuse cases from the terms of collective bargaining agreements. If Maggio wished to place such cases beyond the purview of an arbitrator, an appropriate term could have been agreed upon. Under the present circumstances, the Court will not use the public policy doctrine to modify the terms of the parties agreement.

Equally unconvincing is Maggio's assertion that the conflict that may be created between the Commissioner's findings and those of an arbitrator necessarily requires a ruling that the Commissioner has exclusive jurisdiction to investigate suspected cases of patient abuse. According to Maggio, the conflict is demonstrated by the fact that

the Commissioner can pursue remedies against Ackley and Maggio despite the arbitrator's contrary findings.

While Maggio's argument may have some abstract appeal, the Court finds it similar to the employer's argument that was rejected by the Second Circuit Court of Appeals in *Local 453, Internat'l. Union of Electrical, Radio & Machine Workers, AFL-CIO v. Otis Elevator Co.*, 314 F. 2d 25 (2d Cir.) *cert. denied*, 373 U.S. 949 (1963). There, the Court held that a criminal statute that could expose the employer to prosecution if the employee was guilty of illegal gambling did not preclude enforcement of an arbitrator's award of reinstatement. While the Court recognized the policy against engaging in and fostering illegal activity, the Court held that the possibility that an employer who disciplined an employee for illegal gambling would be found guilty of violating the criminal law was too remote to warrant vacating the award. *Id.* at 29.

Here, too, the possibility of prosecution of Maggio is remote. Although, as noted above, the Commissioner has the right to impose penalties on Maggio and Ackley, he did not choose to exercise that right and there is no indication that penalties will be imposed. As noted above, the Commissioner stated specifically that in lieu of exercising the right to impose penalties, a letter detailing the charges against Ackley would be placed in his file and serve as an "admonishment" to Ackley. Under these circumstances it is unlikely that the Commissioner will pursue penalties against Maggio.

Further militating against Maggio's "conflict" argument is that, notwithstanding the differences in the factual findings of the arbitrator and the Commissioner, the penalty actually imposed by the arbitrator is more drastic than any penalty imposed by the Commissioner. Thus, the arbitrator's award has arguably done more to further

the public policy against the abuse of patients than the Commissioner's own mechanism. Cf. *Local 453*, 314 F. 2d at 29 (noting that arbitrator's mandated seven-month layoff without compensation or accrual of benefits arguably did more to vindicate New York's policy against gambling than imposition of a fine for violation of criminal law).

In a similar vein the Court notes that the remedy of firing a patient abuser is not available to the Commissioner. In addition to militating against a finding of conflict between the Commissioner's remedies and those of an arbitrator, the Court notes that if Ackley were found to have intentionally mistreated residents there is little doubt that the arbitrator would have found just cause for the termination. Such a finding would similarly further the policy against patient abuse.

In sum, the Court finds no policy vesting the exclusive right to investigate instances of suspected patient abuse in the Commissioner. Accordingly the Court turns to consider whether, in light of the arbitrator's findings, the remedy of reinstatement is barred by considerations of public policy.

According to Maggio, public policy bars reinstatement of Ackley because the arbitrator found Ackley to be a "patient abuser." If Maggio's characterization of Ackley were correct, the Court would be inclined to agree that reinstatement violated public policy. There is little doubt that the above-referenced statutes evidence a policy that seeks to protect residents of health care facilities from being subject to physical abuse. The mere statement that reinstatement here violates public policy, however, does not satisfy the Supreme Court's requirement that a sufficient link be shown between enforcement of the award and violation of the public policy.

As noted above, the award was rendered after hearings and discusses the instances of alleged abuse in great detail. Although the Award uses the term "mistreatment" when discussing how Ackley handled patients Ingoglia and Krause, a fair reading of the Award reveals that Ackley did not engage in the type of conduct that the aforementioned statutory scheme seeks to prevent. Specifically, as noted above, the Award noted that any "rough handling" on Ackley's part could be attributed to his "size, bulk, strength and, at times, being rushed to perform chores." Given the fact that Ackley did not intentionally abuse patients the arbitrator held that the firing was not for just cause.

Indeed, a fair reading of the Award reveals that the arbitrator's opinion is completely in line with the policy identified by Maggio. Thus, the Award states that "patient abuse is totally unacceptable" and notes that the elderly in nursing homes are in need of special care and are totally at the mercies of those who care for them. Thus, this Court has little doubt that if the arbitrator found Ackley to be a true "patient abuser," there is little doubt that the arbitrator would have upheld the firing. Since the Court finds no link between the policy protecting patients from physical abuse and enforcement of the Award, the Court declines to vacate the Award on the ground that, under the terms of the Award, the remedy of reinstatement is prohibited by public policy.

Finally, the Court notes that in the event that an actual conflict existed, the ruling in this case might be different. If, for example, the Commissioner were to find that Maggio should be fined one thousand dollars for every day that Ackley remains employed at PNC, the Court would likely find that the forced reinstatement violates clearly articulated public policy. In such a case, Ackley's conduct would, no doubt, be found to rise to the level that

would violate the policy against mistreatment of patients. Where, as here, however, the Commissioner has issued only an admonishment, the Court cannot find that a conflict warranting denial of confirmation of the award exists.

CONCLUSION

After reviewing the state and federal statutory scheme regulating the care to be provided residents of health care facilities the Court holds that public policy does not prohibit a labor arbitrator from determining whether just cause exists for a union member's firing where the proffered reason for the firing is the suspected abuse of patients. Because the Court finds that the remedy of reinstatement in this case does not violate the policy prohibiting the abuse of patients the Court declines to vacate the award on the basis that enforcement violates public policy. Accordingly, the award is confirmed.¹

SO ORDERED.

s/
LEONARD D. WEXLER
UNITED STATES DISTRICT COURT

Dated: Hauppauge, New York
December 4, 1988

¹ Maggio has also raised, in a footnote to the brief, the argument that the arbitrator's failure to accept the Commissioner's findings into evidence constitutes a separate ground for vacating the award under 9 U.S.C. §10(c). Since Maggio has raised this argument only in a footnote, this Court will respond in a similar fashion. An arbitrator's award will not be set aside for failure to accept a document into evidence unless that ruling deprives the parties of a "fundamentally fair hearing." *Bell Aerospace Co. Division of Textron, Inc. v. Local 516*, 500 F.2d 921, 923 (2d Cir. 1974). Here, the Court cannot find that the failure to accept a preliminary finding of an agency that held no hearing prior to issuing its ruling, deprived Maggio of the right to a fair hearing. Accordingly, the Court cannot set aside the award based on a violation of 9 U.S.C. §10(c). *See Misco*, 108 S.Ct. at 372 (refusing to set aside award based on arbitrator's refusal to accept evidence where arbitrator's error "was not in bad faith or so gross as to amount to affirmative misconduct").

APPENDIX C

**OPINION AND AWARD OF ARBITRATOR
DAVID RAFF DATED MARCH 30, 1988**

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration
Between:

Local 1199, Drug, Hospital and Health Care
Employees Union, RWDSU, AFL-CIO

-and-

Patchogue Nursing Home

Re: Termination of Clifford Ackley

Case No.
1730 0061 87

**OPINION AND
AWARD**

DAVID RAFF, ARBITRATOR

Appearances: Amy Gladstein, Esq. for the Union
Frederic Block, Esq. for the Employer

INTRODUCTION

The employer Patchogue Nursing Home ("Employer")
suspended Clifford Ackley ("Grievant") on February 23,

1987 on the grounds that the grievant had abused four patients under his care. Hearings were held before me at the Garden City offices of the American Arbitration Association on October 1, 1987 and January 26, February 10 and February 25, 1988. Both parties submitted post arbitration memoranda.

ISSUE

The parties agree that the issue before me is whether or not Clifford Ackley was fired for cause and, if not, what the remedy should be.

CONTENTIONS OF THE PARTIES

Employer's Contention

The employer contends that in the month of February 1987 Clifford Ackley abused or mistreated four patients of the Nursing Home: Florence Cattani, Anthony Ingoglia, Ruth Krause and Leon Cootner. Each patient will be addressed in turn.

Florence Cattani

Ms. Cattani is an elderly woman who is not verbal. While she can walk with support, she is unstable and will wobble and fall if support is removed. When she is moved from her bed, a pelvic restraint is put on her to tie her down to a chair.

The employer contends that at some point in early February 1987 Nurses' Aide Kathryn Almeida saw grievant sitting in a chair holding the strings from Ms. Cattani's pelvic restraint while Ms. Cattani was standing and trying to pull away. Ms. Cattani was wobbling from side to side and Mr. Ackley was giggling while holding the strings. Ms. Almeida testified that this incident lasted

about five minutes. She also testified that she saw Mr. Ackley push Ms. Cattani up against the wall as he walked Ms. Cattani out of her room to the Day Room.

The employer's position is that each of the two incidents rose to the level of patient abuse.

Anthony Ingoglia

Anthony Ingoglia is an elderly man who is verbally unresponsive and who cannot bear any weight. He needs total care.

The employer contends that some time in early February 1987, Nurses' Aide Lisa Amoruso was lifting Mr. Ingoglia onto his bed with Mr. Ackley and that during the lift, Mr. Ackley used excessive force causing Mr. Ingoglia to hit his head on the head board. According to the employer such a use of excessive force, causing the patient to hit his head, is patient abuse.

Ruth Krause

Ruth Krause is an elderly woman who was verbal but otherwise needed total care.

The employer contends that on or about February 9, 1987 Mr. Ackley, while turning Ms. Krause over in her bed, used excessive force causing Ms. Krause to hit her arm on the side rail of the bed. The employer also contends that, at some point, Ms. Krause's foot got stuck between the side rail and the mattress, but that grievant refused to assist when asked to do so by the patient. It is the employer's position that Mr. Ackley's conduct, in both instances, is patient abuse.

Leon Cootner

Leon Cootner is an elderly man. He needs assistance in toileting and in moving from his bed to a wheelchair.

The employer contends that in the early part of February 1987, Kathryn Almeida saw Mr. Ackley elbow Mr. Cootner in the stomach while transferring him from the bed to the chair causing Mr. Cootner to double over into the chair. Ms. Almeida heard Mr. Ackley say to Mr. Cootner: "You wanta play games with me."

The employer argues that Mr. Ackley's conduct was intentional and is patient abuse.

In addition to these specific incidents, the employer contends that, in general, Mr. Ackley uses too much force in caring for patients.

UNION'S CONTENTIONS

Simply put, grievant denies that any of the incidents complained of took place. However, the union argues that even if some of them did occur, it was no more than lack of coordination during lifts and the over reactive complaints of a known complainer.

Florence Cattani

Grievant denies that he sat in a chair holding the straps of the pelvic restraint and giggled while Ms. Cattani stood in front of him trying to pull away. He testified that Ms. Cattani wobbles when she stands and could remain without support only a minute before she would fall. The union argues that the testimony of Henrika Garifo and James McCrary support the proposition that Ms. Krause could not have remained standing for five minutes, as testified to by the employer's witness, Ms.

Almeida. The union's position is that Ms. Almeida's testimony is not credible since it was impossible for Ms. Cattani to remain standing for any length of time.

Grievant also denies having ever pushed Ms. Cattani into a wall.

Anthony Ingoglia

Grievant recalls having lifted Mr. Ingoglia onto his bed with Lisa Amoruso but does not remember Mr. Ingoglia ever hitting his head on the head board.

Ruth Krause

Grievant contends that he was Ms. Krause's favorite orderly and that she asked for him specifically. He denies turning her in a rough manner or causing her arm to strike a side bar on the bed. He also denies refusing to help her free a trapped foot. The union argues that Ms. Krause was a well known complainer who felt that everyone treated her too roughly.

Leon Cootner

Grievant testified that Mr. Cootner was a large man weighing over 200 pounds. On some occasions Mr. Cootner could bear weight, but he would also lose that ability suddenly causing him to collapse or fold over. Grievant denies ever elbowing Mr. Cootner or saying to him: "You wanta play games with me."

The union notes that the both Ms. Amoruso and Ms. Almeida did not file their patient abuse reports until some two weeks after the alleged events. Moreover, there was no contemporaneous patient abuse report regarding the treatment of Ms. Krause. Rather, the Krause incident was referred to in a report prepared by Nurse Joy Uhrie

after she sought out possible patient abuse incidents regarding Mr. Ackley. This was elaborated upon in the March 20, 1987 Mr. McBride report, some six weeks after the alleged incident.

DISCUSSION

I start my analysis with two straightforward propositions. The first is that patient abuse is totally unacceptable. The elderly in nursing homes, the mentally retarded in developmental facilities and the emotionally disturbed in psychiatric centers are in need of special care and special considerations. They cannot protect themselves or even, in many, instances, care for themselves. They are totally at the ministrations and mercies of orderlies, aides, nurses and doctors who have been charged with their care. In many cases, like the one being decided here, the patients are not verbal or are otherwise unable to appear in a proceeding to explain what happened to them.

The second proposition is that the employer must meet its burden by a preponderance of the evidence. This means that I must be persuaded that it is more likely that the event took place than that it did not. Some arbitrators use the higher evidentiary burden of clear and convincing evidence in patient abuse cases because such conduct is a violation of law and the view is that where an employee is accused of a violation of law a higher standard must apply. While, in general, I agree with that view, patient abuse cases fall into a unique category. They are not the same as selling illegal drugs, theft, gambling or the like. Rather, there is a very strong public policy that patients who cannot care for themselves must be protected against abusive conduct. The parties to the collective bargaining agreement recognized this policy when they agreed that when a patient does not appear at the arbitration, such failure to appear cannot be considered as prejudicial. See

Joint Exhibit "1," Article XXIX, section 4. This agreement runs directly counter to the generally accepted principle that the party making the complaint should produce the complainant. If they do not, the case is usually dismissed or, at least, there is an adverse inference.

Finally, the sensitivity to allegations of abuse in a nursing home, and its strong reaction thereto, must be recognized as legitimate unless there are other motivating factors shown, such as anti union animus or bias against the accused. It is well recognized that nursing homes are under intense scrutiny as a result of prior nursing home scandals. Any nursing home that fails to react promptly and strongly to allegations of abuse is leaving itself open to sanctions from both the federal and state government.

In Mr. Ackley's case, the record shows that the nursing home had probable cause to suspend Mr. Ackley. It had two witnesses who submitted statements alleging abuse or mistreatment and a reasonable belief that Ms. Krause had been mistreated. However, probable cause for suspension does not amount to proof on the merits that the alleged incidents took place as reported or that each and every one of the incidents, if proven, rises to the level of a dischargeable offense.

Mr. Ackley has been accused of abusing or mistreating four patients. The most serious of the charges involve Ms. Cattani and Mr. Cootner. The allegations, as to these two patients, contain the element of intent to embarrass, demean, belittle or harm the patients. However, with regard to Mr. Ingoglia and Ms. Krause, the allegations are really limited to rough handling without any showing that Mr. Ackley intended to harm the patients or was grossly negligent.

Florence Cattani

The sole witness against Mr. Ackley in the Cattani case is Kathy Almeida, an aide who had been on staff only a few months before the reported incidents. At first blush she appears to be a credible witness who had no reason to fabricate her report about Mr. Ackley. On the other hand, notwithstanding the obvious self interest involved, Mr. Ackley was also quite credible. If the scales upon which proof are weighed remain in balance, the employer has failed to meet its burden using the preponderance of the evidence test, and grievant must prevail. However, with regard to Ms. Cattani, upon a closer look at all the evidence, I need not use the balance test since the scale tips, slightly, in Mr. Ackley's favor.

Ms. Almeida testified that grievant sat in a chair holding the strings of Mr. Cattani's pelvic restraint and giggled while Ms. Cattani stood wobbling from side-to-side trying to pull away. Ms. Almeida further testified on both direct and cross that the incident took place over a five minute period before grievant walked Ms. Cattani into the hall.¹ Although Ms. Almeida claimed she observed Ackley's abusive behavior with Ms. Cattani, she neither intervened nor reported the matter until some two weeks later.

¹ When I asked Ms. Almeida to estimate a block of time during her examination, she was quite accurate. Interestingly, the union, in its brief at 7, argues that Ms. Almeida did not have a good sense of time. I have reviewed the tape of the arbitration and found that Ms. Almeida was reasonably accurate.

Grievant and his witnesses, Henrika Garifo and James McCrary, all testified that Ms. Cattani could bear weight and could walk while being supported. These witnesses also testified, however, that she was very unsteady, would wobble from side to side and would very quickly fall if left standing without support. I find it somewhat incredible that Ms. Almeida could have observed Ackley's purported conduct for five minutes and neither did anything while Ms. Cattani struggled nor reported this incident until two weeks later. Ms. Cattani's ability to stand, without falling over under the conditions described, is a critical factor and I find grievant's and his witnesses' testimony that she could not do so credible. The employer offered no evidence from any nursing home aide, orderly or nurse, other than Ms. Almeida, that Ms. Cattani was physically capable of standing for five minutes under the conditions set forth.

Ms. Almeida also testified that she saw Mr. Ackley push Ms. Cattani into a wall. Ms. Cattani was an active woman who had involuntary movement of her limbs, was unsteady on her feet and who needed assistance in walking. When she did walk, she tried to walk fast. Ms. Almeida admitted that Ms. Cattani walks into things like hallway rails and wheel chairs. Mr. Ackley denies having pushed Ms. Cattani into a wall, and I find his testimony credible; however, it is quite possible that she walked into a wall or, because she was unsteady, wobbled or fell into a wall while Mr. Ackley was walking her. While it may be that Ms. Almeida did see Ms. Cattani go into a wall when being walked by Mr. Ackley, I am not convinced that Mr. Ackley pushed her into the wall. In the event that Ms. Cattani did go into a wall while being walked by grievant, Mr. Ackley was guilty of, at most, carelessness.

Leon Cootner

Ms. Almeida testified that while Mr. Ackley was moving Mr. Cootner from his bed to a wheel chair, Mr. Ackley put his arm or elbow into Mr. Cootner's stomach, causing him to double over, and said, "You wanta play games with me." She further testified that Mr. Cootner gave grievant a hard time that day.

The credible evidence shows that Mr. Cootner was a large man weighing about 200 pounds. He needed to be assisted from his bed to a wheel chair. While at times he could stand and bear weight, sometimes his legs gave out causing him to collapse abruptly.

For the reason set forth above, in Ms. Cattani's case, Ms. Almeida's powers of observation are not sufficient to convince me that Mr. Ackley intentionally elbowed Mr. Cootner. It is just as likely that while Mr. Ackley was making the transfer, Mr. Cootner was taking some of his own weight but that he suddenly lost that ability causing him to drop suddenly into the wheel chair. This all would happen very quickly and if Mr. Ackley was trying to support him from the side it could look like an arm was placed into Mr. Cootner's stomach causing him to drop.

It is noteworthy that Ms. Almeida did not report this incident until some two weeks later.

The employer argues that the reporting delays in both Mr. Cootner's and Ms. Cattani's cases are, although not condoned, understandable. Ms. Almeida was a new employee, she was afraid of retribution from co-workers and was unsure of what patient abuse was. This reasoning does not hold up, however. Ms. Almeida did receive in-service training when she started and knew that she was to report patient abuse. She received an in-service

training a second time after the incident. It is difficult to believe that she would have have any doubt that Mr. Ackley's treatment of Ms. Cattani or Mr. Cootner, if true, would be physical patient abuse or mistreatment. It should not take anyone more than one in-service session, which took place only a few months before the events complained of, to know that pushing Ms. Cattani into a wall or holding her by the pelvic restraint strings while laughing, for five minutes, or elbowing Mr. Cootner was patient abuse. I am also struck by the fact that Ms. Almeida took no action to assist either patient. I find it, if not incredible, then certainly disconcerting that an aide could simply stand by for five minutes watching while a fellow orderly played with Ms. Cattani like a puppet on a string and not, at least, try to halt the display.

In making these observations, I am fully aware of the problem of any employee "ratting" on a fellow co-worker, especially where the employee is the "new person on the block" and the co-worker has been in the job for some time. Nonetheless, when, without a clear precipitating event, the employee comes forward some weeks later to "clear her conscience," one must examine the circumstances and the alleged observations with great care.

Anthony Ingoglia

Lisa Amoruso, also a new employee, having been hired in November 1986, testified that Mr. Ackley was unnecessarily rough in transferring Mr. Ingoglia onto his bed. As a result, she claimed, Mr. Ingoglia hit his head on the headboard. Ms. Amoruso further testified that Mr. Ackley was rough with other patients and sometimes did not coordinate lifts.

Like Ms. Almeida, Ms. Amoruso reported the Ingoglia incident some time well after its occurrence. Indeed, she

did so only after conferring with Ms. Almeida and being questioned by her supervisors.

Mr. Ackley denied the specific event involving Mr. Ingoglia hitting his head or that he treated patients too roughly.

Ms. Amoruso was a credible witness and I find that grievant did treat Mr. Ingoglia too roughly. Mr. Ackley is a very large and very strong man. It is quite possible that on some occasions he did not control his lifts with the necessary care. However, it must be noted that Ms. Amoruso did state that Mr. Ackley "never did anything intentionally." Obviously, negligence that causes injury to a patient is not acceptable. Mr. Ackley has an obligation to assure that he does not, because of his size and bulk, unwittingly cause a patient harm or discomfort.

Even though I have found that grievant handled Mr. Ingoglia, too roughly, his conduct does not rise to the level of a dischargeable offense.

Ruth Krause

Subsequent to the patient abuse reports filed by Ms. Almeida and Ms. Amoruso, Nurse Joy Uhrie commenced an investigation. As part of that investigation she talked to staff members and patient Ruth Krause. On March 13, 1987 Special Investigator Thomas McBride interviewed Ms. Krause.

The sum and substance of McBride's and Uhrie's testimony, and their written reports, is that Ms. Krause complained that grievant handled her too roughly in turning her and that on one occasion she hit her arm on a side rail as a result of Mr. Ackley's rough handling. She also complained that on another occasion her foot became

caught between the side rail and the bed and, instead of helping her, Mr. Ackley told her to take care of it herself.

Nurse Marie McKee, Ms. Garifo, Mr. McCrary and Mr. Ackley all testified that Ms. Krause was quite verbal, very demanding and frequently complained about the way orderlies and aides handled her. In addition, Ms. Garifo, Mr. McCrary and Mr. Ackley stated that Ms. Krause's involuntary leg movements made it difficult to turn her in bed.

Based upon credible evidence, I find that grievant did handle Ms. Krause too roughly. I further find, however, that the incidents complained of by Ms. Krause were overblown and that she was a chronic complainer. While Mr. Ackley may not have used the degree of care in handling Ms. Krause that should have been exercised, there was no intent to abuse, mistreat or cause discomfort to Ms. Krause.

Pattern and Practice

Mr. Ackley was employed by the nursing home as an orderly since August 13, 1984. His record is clean up to the time of the incidents leading to his suspension. The employer has tried to show that, for some reason, Mr. Ackley's conduct or attitude changed sometime between December 1986 and mid February 1987. This change, according to the employer, resulted in a pattern or practice of patient abuse and mistreatment, and a verbal altercation with Nurse Caliendo in early January 1987 about whether Mr. Ackley properly responded to a supervisor's request for assistance.

The employer failed to make out a clear case of a change in behavior or a pattern or practice of patient abuse. The verbal altercation with Nurse Caliendo was

an isolated incident resulting from Mr. Ackley's belief that he was being wrongly accused of not responding to a supervisor's request in a prompt manner. Mr. Ackley's outburst cannot be condoned or excused. Indeed, he was subjected to a three day suspension for it. An isolated supervisor-employee verbal argument where the employee loses his temper and makes unfortunate remarks, neither supports the argument that such a person would abuse patients nor does it show an uncharacteristic change in behavior which would lead one to believe that he was generally angry and was taking his anger out on patients.

The only pattern that I do find is that Mr. Ackley has a tendency to handle some patients a little too roughly. I attribute this to his size, bulk, strength and, at times, being rushed to perform chores. Mr. Ackley has a responsibility to use utmost care in handling patients and must be more aware that his size can be both a benefit and a hindrance in turning patients and doing lifts.

CONCLUSION

I find that grievant did not abuse patients Cattani and Cootner.

I further find that grievant did treat Mr. Ingolia and Ms. Krause too roughly. However, I do not find either intent or the degree of negligence necessary to warrant discharge. A more appropriate penalty would be a one month suspension without pay.

BACK PAY

The employer has raised the issues of mitigation of damages and offset in an effort to reduce any back pay that may be due. Testimony has been taken on the mitigation issue and the parties were to address it, as well

as offset, if I directed grievant's reinstatement. The union has prematurely argued its position on mitigation in its post arbitration brief. Since the employer has not had its opportunity to file an argument on mitigation, I will not rule on this issue at this time.

With regard to offset, I have reviewed grievant's W-2 forms and his 1986 tax return, which was submitted to me for *in camera* review. The W-2 forms accurately reflect Mr. Ackley's wages and there is no reason to provide the employer with his tax returns.

Within three weeks of the date of this Opinion and Award, the parties shall submit their arguments on the issues of mitigation and offset. Each party shall, in addition, submit its calculation as to the amount of back pay due, along with the method of calculation. The employer's submission on the back pay calculation will be considered without prejudice to its position that grievant may not be owed any wages due to his failure to mitigate damage. The parties shall file responsive papers no later than ten days after receipt of opposing counsel's back pay memorandum. No further hearing will be held unless a party shows good cause or I determine that I cannot make a decision without a further hearing.

AWARD

Grievant is not guilty of abusing patients Cattani and Cootner.

Grievant is guilty of mistreating patients Ingoglia and Krause as a result of rough handling stemming from carelessness. The appropriate penalty is a one month suspension without pay.

Grievant shall be immediately reinstated. He is entitled

to back pay from March 23, 1987 to the date of reinstatement, the amount to be determined.

I will retain jurisdiction of this case until the amount of back pay has been fully determined.

s/_____
David Raff
Arbitrator

STATE OF NEW YORK

}ss.:

COUNTY OF NEW YORK

I, DAVID RAFF, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

March 30, 1988

s/_____
DAVID RAFF

APPENDIX D

**LETTER FROM OFFICE OF HEALTH SYSTEMS
MANAGEMENT TO CLIFFORD ACKLEY
DATED DECEMBER 9, 1987**

December 9, 1987

**CERTIFIED LETTER
RETURN RECEIPT REQUESTED**

Mr. Clifford Ackley
200 Manhattan Ave.
North Babylon, New York 11703

Dear Mr. Ackley:

Re: Patchogue Nursing Home
OHSM Log # HSO 87-02-010-340
HSO 87-02-011-340
HSO 87-02-012-340

Acting on behalf of the Commissioner of Health of the State of New York pursuant to Section 2803-d of the Public Health Law and rules and regulations promulgated thereunder, I have reviewed the investigation of a report of patient physical abuse, while you were employed at the above named facility. This report was made to the Office of Health Systems Management on February 24, 1987, and investigated by the staff of the New Rochelle Sub Area Office on February 26, 1987.

I hereby find the following:

On an undetermined day in the first part of February, 1987 at approximately 4:15 p.m., you forcefully struck

patient Mr. Leon Cootner in the stomach with your elbow.

On an undetermined day in the first part of February, 1987 after assisting patient Ms. Florence Cattani from her bed, you forcefully pushed the patient against the wall. You then held the strings of the patient's restraint while the patient stumbled trying to walk away.

On or about February 22, 1987 during the approximate period of time 3:30 p.m. to 5:00 p.m. you forcefully transferred patient Mr. Anthony Ingoglia from his wheelchair to his bed. As a result, the patient struck his head against the headboard of the bed.

On or about February 9, 1987 at approximately [sic] 7:30 p.m., you forcefully assisted patient Ms. Ruth Krause to turn over in bed. As a result, the patient struck the bed siderail with one or both of her arms.

Pursuant to the provisions of Section 2803-d of the Public Health Law, I have determined that there is sufficient credible evidence that patient physical abuse occurred as described in the regulations pertaining thereto. Violations of Section 2803-d of the Public Health Law may result in a fine of up to \$1000.00 per violation.

Please be advised that although sufficient credible evidence exists to sustain this report, I recommend that no monetary fine be assessed against you. In lieu of a fine, this letter is issued as an admonishment for your actions.

Please be advised that, upon receipt of this letter, you have thirty (30) days to request that I amend or expunge the record of the report in this matter. If your request is refused or not acted upon within thirty (30) days, you have the right to a fair hearing to determine whether the record of the report in this matter should be amended or

expunged on the grounds that it is inaccurate, or the determination is not supported by the evidence. If you do not request a hearing, the record of the report will be retained by the Department and may be subject to public disclosure under the Freedom of Information Law.

Sincerely,

s/
William B. Carmello
Commissioner's Designee

Inquiries to: Bureau of Long Term Care
Services (OHSM Log #NYC 87-05-047-340)
Room 1882
Tower Building
Empire State Plaza
Albany, New York 12237

APPENDIX E

FEDERAL AND NEW YORK STATE STATUTES AND REGULATIONS

A. FEDERAL

1) Quality of Life.

"[A] skilled nursing facility must care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident." 42 U.S.C. §1395i-3(b)(1)(A); *see also*, 54 Fed. Reg. 5363 (1989) (to be codified at 42 C.F.R. §483.15). The services provided by a nursing facility must "attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident." 42 U.S.C. §1395i-3(b)(2). The nursing facility must provide "nursing services and specialized rehabilitative services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident." 42 U.S.C. §1395i-3(b)(4)(A)(i); *emphasis supplied*; *see also*, 54 Fed. Reg. 5370 (1989) (to be codified at 42 C.F.R. §483.75).

The services provided by nurse aides must be continually reviewed by the nursing facility. 42 U.S.C. §1395i-3(b)(5); *see also*, 54 Fed. Reg. 5371 (1989) (to be codified at 42 C.F.R. §483.75[g][5]). 42 U.S.C. §1395i-3(b)(5)(E) states:

The skilled nursing facility must provide such regular performance review and regular in-service education as assures that individuals used as nurse aides are competent to perform services as nurse aides (*emphasis supplied*).

The services provided or arranged by the facility must meet professional standards of quality. 42 U.S.C. §1395i-3(b)(4).

2) Requirements Relating to Patients' Rights.

"[A] skilled nursing facility must protect and promote the rights of each resident", including "[t]he right to be free from physical or mental abuse." 42 U.S.C. §1395i-3(c)(1)(A)(ii). The nursing facility operator must establish written policies regarding the rights of patients in order to ensure that each patient "is treated with consideration, respect and full recognition of his dignity and individuality, including privacy in treatment and in care for his personal needs." 42 C.F.R. §405.1121(k)(9).

"Care Guidelines" have been developed by the Department of Health and Human Services ("HHS") as a resource document for surveyors, which Guidelines instruct the surveyor to inquire from the patients whether they have ever been "hit or treated roughly." 52 Fed. Reg. 24825 (1987). The regulations require the facility to take "appropriate corrective action" once an alleged violation of a patient's rights has been verified, and specifically prohibits the nursing home from employing individuals who have "been convicted of abusing, neglecting or mistreating individuals." 54 Fed. Reg. 5363 (1989) (to be codified at 42 C.F.R. §483.13[c][1] and [4]).

3) Cooperation With State Governments: The Registry.

The states are responsible for maintaining a nurse aide registry (42 U.S.C. §1395i-3[e][2][A]), which must include any documented findings by a state of resident abuse or neglect. 42 U.S.C. §1395i-3(e)(2)(B). Before a nursing home can hire a nurse aide it must first consult the registry and evaluate any information contained therein concerning the competency of the aide. 54 Fed. Reg. 5371 (1989) (to be codified at 42 C.F.R. §483.75[g][3]).

4) Penalties.

If the facility is not in compliance with the federal statutory and regulatory scheme and its deficiencies immediately jeopardize the health or safety of its residents, the Secretary of HHS must either: (1) immediately appoint temporary management; or (2) terminate the facility's participation in Medicare or Medicaid. 42 U.S.C. §1395i-3(h)(2)(A)(i).

If a facility is not in compliance but its deficiencies do not immediately jeopardize the health or safety of its residents, the Secretary may impose intermediate sanctions or terminate the facility's participation in the Medicare and Medicaid programs. 42 U.S.C. §1395i-3(h)(2)(A)(ii). The intermediate sanctions are: (1) denial of payment for new Medicare or Medicaid admissions; (2) civil penalties not to exceed \$10,000 for each day of noncompliance, and (3) appointment of temporary management to operate the facility. 42 U.S.C. §1395i-3(h)(2)(B)(i), (ii), and (iii).

B. NEW YORK STATE

1) The Reporting, Investigation And Adjudication Of Patient Abuse, Mistreatment Or Neglect.

The Legislature of the State of New York has made the following express finding:

The legislature finds that patients of nursing homes and facilities providing health related services have special problems in reporting abuse and in protecting themselves from it. It is the intention of the legislature to encourage the staff of nursing homes and facilities providing health related services to report instances

of abuse in order to protect the physical health and physical safety of persons residing in those facilities. L. 1977, c. 900, §1.

New York Public Health Law ("PHL") §2803-d(3) mandates that an administrator of a nursing home report all incidents of patient abuse, mistreatment or neglect to the Department of Health ("DOH") within 48 hours after learning of the incident. Pursuant to 10 NYCRR §81.1, the DOH has promulgated the following definition of "abuse:"

(a) The term abuse shall mean inappropriate physical contact with a patient or resident of a residential health care facility, while such patient or resident is under the supervision of the facility, which harms or is likely to harm the patient or resident. Inappropriate physical contact includes, but is not limited to, striking, pinching, kicking, shoving, bumping and sexual molestation.

Upon receiving a report of patient abuse, DOH must, within 48 hours, cause an "onsite investigation" to be made (10 NYCRR §81.5) and to thereafter make a "written determination, based on the findings of the investigation, of whether or not sufficient credible evidence exists to sustain the allegations contained in the report or would support a conclusion that a person not named in such a report has committed an act of physical abuse, neglect or mistreatment." PHL §2803-d(6)(a). Those wishing to challenge the determination are entitled to a hearing. PHL §2803-d(6)(d).

2) Rights of Patients In Nursing Homes.

PHL §2803-c(2) states that DOH shall require every nursing home to "adopt and make public a statement of

the rights and responsibilities of the patients who are receiving care in such facilities, and shall treat such patients in accordance with the provisions of such statement." Subdivision (3) of PHL §2803-c provides, in pertinent part:

3. Said statement of rights and responsibilities shall include, but not be limited to the following:

g. Every patient shall have the right to receive courteous, fair, and respectful care and treatment...

h. Every patient shall be free from mental and physical abuse...

DOH regulations accord each patient the right to be "treated with consideration, respect, and full recognition of his dignity and individuality." 10 NYCRR §414.14(12).

3) The Nursing Home Operator's Duty To Provide Qualified Personnel.

DOH rules require an operator of a nursing home to provide qualified personnel. 10 NYCRR §414.17 provides, in pertinent part, as follows:

The operator shall:

(a) provide such qualified personnel and complementary services as are necessary to assure the health, safety, proper care and treatment of the patients;

(d) assure that each part-time, full-time or private duty employee, consultant, volunteer, or other person serving in any other capacity in the nursing home shall:

(3) conduct himself in a professionally acceptable manner with all patients, employees and guests, including refraining from abusive, immoral or other unacceptable conduct, behavior or language; etc.

4) Penalties.

If an operator of a nursing home fails to perform his statutory duty to promptly report incidents of patient abuse, mistreatment or neglect, he is guilty of unprofessional conduct and is subject to a civil penalty in an amount up to \$1,000 for each violation. PHL §§12(1); 2803-d(5) and (7); 10 NYCRR §81.7(a).

An operator who fails to ensure that a patient is free from mental and physical abuse and is treated with consideration, respect and full recognition of his dignity and individuality is subject to a penalty of \$1,000 per day for each day that the violation continues. 10 NYCRR §414.18(a).

An operator who fails to provide qualified personnel for the patients' health, safety, proper care and treatment, and who fails to ensure that each employee conducts himself in a professionally acceptable manner with all patients, is subject to a penalty of \$750 and \$400 per day, respectively, for each day that such violation continues. 10 NYCRR §414.18(a).

The Public Health Law provides for additional monetary penalties for any violation of any Public Health Law statute or any regulation promulgated thereunder. PHL §12. Willful violations subject the nursing home operator to misdemeanors punishable by fine and/or imprisonment. PHL §12-b.

(2)
No. 89-404

Supreme Court, U.S.

FILED

OCT 27 1989

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

PAUL C. MAGGIO, d/b/a PATCHOGUE NURSING CENTER,

Petitioner,

—v.—

LOCAL 1199, DRUG, HOSPITAL AND HEALTH CARE
EMPLOYEES UNION, R.W.D.S.U., AFL-CIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

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COUNTERSTATEMENT OF THE CASE

The decision of which petitioner seeks review is an unpublished summary order of the United States Court of Appeals for the Second Circuit affirming a district court order which confirmed a labor arbitration award concerning the discharge of an employee. App. 1.¹

The employee was employed as an orderly at the nursing home operated by petitioner. Petitioner discharged the

1 Page references preceded by "App." are to the appendix annexed to the petition.

employee for allegedly having abused four patients. Respondent, the collective bargaining representative of petitioner's employees, filed a grievance on behalf of the employee and took the matter to arbitration. App. 7-8, 24-25.

After four days of hearing, the arbitrator found that two of the alleged acts of patient abuse had not occurred, and that the other two involved unintentional conduct caused by the employee's "size, bulk, strength and, at times, being rushed to perform chores". App. 9, 31-37. The arbitrator ruled that petitioner had failed to establish cause for discharge and converted the disciplinary penalty to a one-month suspension. App. 9, 37.

Meanwhile, petitioner filed a report concerning the alleged patient abuse with the New York State Office of Health Systems Management ("OHSM"), as it was required to do if it had reasonable cause to believe any patient abuse or mistreatment had occurred. See N.Y. Pub. Health L. § 2803-d(1). Such a report automatically triggers an investigation by OHSM. N.Y. Pub. Health L. § 2803-d(6)(a). After the investigation, OHSM made an initial determination that there was sufficient credible evidence to sustain the allegations that the employee had engaged in patient abuse, and recommended that no fine be assessed, but that the letter containing the initial determination serve as an "admonishment". App. 40-41. That letter alone constitutes the "findings" of the Department of Health upon which petitioner relies.

Petitioner refused to comply with the arbitrator's award and moved in the district court to vacate the award. Local 1199 commenced an action for confirmation of the award. On cross-motions for summary judgment, the district court confirmed the award in all respects. *Maggio v. Local 1199*, 702 F. Supp. 989 (E.D.N.Y. 1989) (reprinted at App. 5-23), *aff'd mem.*, No. 89-7142 (2d Cir. June 13, 1989) (reprinted at App. 1-4). In rejecting petitioner's contention that enforcement of the arbitrator's award would violate public policy, the court observed that any analysis of the issue had to take place within the context of the longstanding federal policy favoring labor arbitration. App. 10. It then reviewed in detail both the federal and

state regulatory schemes upon which petitioner based its public policy argument and concluded that "a fair reading of the Award reveals that [the employee] did not engage in the type of conduct that the aforementioned statutory scheme seeks to prevent," and that "the arbitrator's opinion is completely in line with the policy identified by [petitioner]." App. 21.

In an unpublished summary order, the court of appeals unanimously affirmed the district court judgment, and adopted the reasoning of the district court in finding "no violation of public policy by the arbitrator's award". App. 3.

REASONS WHY THE PETITION SHOULD BE DENIED

There is no reason to grant the petition. Petitioner has not identified any respect in which the court of appeals' order conflicts with that of another court of appeals or state court of last resort, or "so far depart[s] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 17.1(a). It advances two purported reasons for granting the petition: (1) an issue that the Court did not reach in *United Paperworkers International Union v. Misco, Inc.*, 108 S. Ct. 364 (1987) and (2) a supposed conflict with the Court's holding in *Misco*. Both arguments are completely meritless.

POINT I

CONTRARY TO PETITIONER'S CONTENTION, THIS CASE DOES NOT PRESENT AN ISSUE LEFT OPEN BY THE COURT IN *MISCO*.

Petitioner contends that "this case presents an important issue not reached in [*Misco*] . . . : '[W]hether a court may refuse to enforce an arbitration award rendered under a collective bargaining agreement on public policy grounds only when the award itself violates positive law or requires unlawful conduct by the employer.' " Petition at 5 (quoting *Misco*, 108 S. Ct. at 375 (Blackmun, J., concurring)). However, petitioner

fails to explain, beyond this bald assertion, just how the issue is presented in the instant case. Examination of the decisions below reveals that, in fact, the issue is not presented at all.

Neither the district court nor the court of appeals even mentioned this issue, much less addressed it in their decisions. A case in which an issue has never been addressed would make an exceedingly poor vehicle for presentation of the issue to this Court. Furthermore, the detailed findings of the district court, which were adopted by the court of appeals, establish that there was no conflict at all between the award and the relevant public policies, App. 20-21, thus eliminating any need to address the issue of how sharp a conflict with public policy is necessary to warrant setting aside an award. This case simply does not present the issue identified by Justice Blackmun in his *Misco* concurrence.

POINT II

NO ISSUE CONCERNING THE APPLICATION OF *MISCO* BY THE COURTS BELOW MERITS REVIEW.

Petitioner also contends that "this case presents the issue whether, under *Misco*, a court may refuse to enforce an arbitrator's award that violates an 'explicit . . . well defined and dominant' policy on the ground that such public policy is not 'explicit . . . well defined and dominant' *enough*." Petition at 5-6 (emphasis and unattributed quotations in original). Again, petitioner is incorrect. Neither the district court nor the court of appeals ruled that the arbitrator's award violated an explicit, well-defined and dominant public policy, nor, for that matter, any other sort of public policy. Quite to the contrary, the district court found, and the court of appeals agreed, that "the arbitrator's opinion is completely in line with the policy identified by Maggio." App. 21, 3.

Petitioner makes much of the court of appeals' use of the word "enough" in describing the kind of public policy which was lacking in this case. Petitioner argues that by using the word "enough", the court of appeals "lowered the *Misco* stan-

dard". Petition at 7. It is clear from the court of appeals' order, however, that the court did nothing more than properly apply *Misco* to the findings of the district court. But even if petitioner were correct, and the court had in fact "lowered the *Misco* standard", the issue nonetheless would not merit review. First, the holding as to whether the public policy at issue was explicit, well-defined and dominant, was not necessary to the result in light of the holding of the district court, adopted by the court of appeals, that the award was wholly consistent with the public policy. That is, the disputed holding was dictum, and inappropriate for review by this Court. Second, the offending word appears only in an unpublished summary order, citation of which in an unrelated case is forbidden by court rule. See Second Cir. R. § 0.23. Thus, even if the standard recited by the court of appeals were incorrect, no other case would be affected by the error.

CONCLUSION

For the reasons set forth above, it is respectfully requested that the petition for a writ of certiorari be denied.

Respectfully submitted,

AMY GLADSTEIN*
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361 Broadway
New York, New York 10013
(212) 941-6161

Attorneys for Respondent

*Counsel of Record





APPENDIX

Section 2803-d(1) of the New York Public Health Law provides:

1. The following persons are required to report in accordance with this section when they have reasonable cause to believe that a person receiving care or services in a residential health care facility has been physically abused, mistreated or neglected by other than a person receiving care or services in the facility; any operator or employee of such facility, any person who, or employee of any corporation, partnership, organization or other entity which, is under contract to provide patient care services in such facility, and any nursing home administrator, physician, medical examiner, coroner, physician's associate, specialist's assistant, osteopath, chiropractor, physical therapist, occupational therapist, registered professional nurse, licensed practical nurse, dentist, podiatrist, optometrist, pharmacist, psychologist, certified social worker, speech pathologist and audiologist.

Section 2803-d(6) of the New York Public Health Law provides:

6. (a) Upon receipt of a report made pursuant to this section, the commissioner shall cause an investigation to be made of the allegations contained in the report. Notification of the receipt of a report shall be made immediately by the department to the appropriate district attorney if a prior request in writing has been made to the department by the district attorney. Prior to the completion of the investigation by the department, every reasonable effort shall be made to notify, personally or by certified mail, any person under investigation for having committed an act of physical abuse, mistreatment or neglect. The commissioner shall make a written determination, based on the findings of the investigation, of whether or not sufficient credible evidence exists to sustain the allegations contained in the report or would support a conclusion that a person not named in such report has committed an act of physical abuse, neglect or mistreatment. A copy of such written

determination, together with a notice of the right to a hearing as provided in this subdivision, shall be sent by registered or certified mail to each person who the commissioner has determined has committed an act of physical abuse, neglect or mistreatment. A letter shall be sent to any other person alleged in such report to have committed such an act stating that a determination has been made that there is not sufficient evidence to sustain the allegations relating to such person. A copy of each such determination and letter shall be sent to the facility in which the alleged incident occurred.

(b) The commissioner may make a written determination, based on the findings of the investigation, that sufficient credible evidence exists to support a conclusion that a person required by this section to report suspected physical abuse, mistreatment or neglect had reasonable cause to believe that such an incident occurred and failed to report such incident. A copy of such written determination, together with a notice of the right to a hearing as provided in this subdivision, shall be sent by registered or certified mail to each person who the commissioner has determined has failed to report as required by this section.

(c) All information relating to any allegation which the commissioner has determined would not be sustained shall be expunged one hundred twenty days following notification of such determination to the person who made the report pursuant to this section, unless a proceeding pertaining to such allegation is pending pursuant to article seventy-eight of the civil practice law and rules. Whenever information is expunged, the commissioner shall notify any official notified pursuant to paragraph (a) of this subdivision that the information has been expunged.

(d) At any time within thirty days of the receipt of a copy of a determination made pursuant to this section, a person named in such determination as having committed an act of physical abuse, neglect or mistreatment, or as having failed to report such an incident; may request in

writing that the commissioner amend or expunge the record of such report, to the extent such report applies to such person, or such written determination. If the commissioner does not comply with such request within thirty days, such person shall have the right to a fair hearing to determine whether the record of the report or the written determination should be amended or expunged on the grounds that the record is inaccurate or the determination is not supported by the evidence. The burden of proof in such hearing shall be on the department. Whenever information is expunged, the commissioner shall notify any official notified pursuant to paragraph (c) of this subdivision that the information has been expunged.

(e) Except as hereinafter provided, any report, record of the investigation of such report and all other information related to such report shall be confidential and shall be exempt from disclosure under article six of the public officers law.

(f) Information relating to a report made pursuant to this section shall be disclosed under any of the following conditions:

(i) pursuant to article six of the public officers law after expungement or amendment, if any, is made in accordance with a hearing conducted pursuant to this section, or at least forty-five days after a written determination is made by the commissioner concerning such report, whichever is later; provided, however, that the identity of the person who made the report, the victim, or any other person named, except a person who the commissioner has determined committed an act of physical abuse, neglect or mistreatment, shall not be disclosed unless such person authorizes such disclosure;

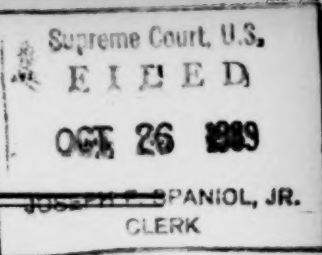
(ii) as may be required by the penal law or any lawful order or warrant issued pursuant to the criminal procedure law; or

(iii) to a person who has requested a hearing pursuant to this section, information relating to the determination upon which the hearing is to be conducted; provided, however, that the identity of the person who made the report or any other person who provided information in an investigation of the report shall not be disclosed unless such person authorizes such disclosure.

(g) Where appropriate, the commissioner shall report instances of physical abuse, mistreatment or neglect or the failure to report as required by this section, to the appropriate committee on professional conduct for the professions enumerated in subdivision one of this section when a determination has been made after the commissioner has provided an opportunity to be heard.

No. 89-404

3



IN THE
Supreme Court of the United States

October Term, 1989

PAUL C. MAGGIO d/b/a Patchogue Nursing Center,

Petitioner,

against

LOCAL 1199, DRUG, HOSPITAL AND HEALTH CARE EMPLOYEES
UNION, R.W.D.S.U., AFL-CIO,

Respondents.

LOCAL 1199, DRUG, HOSPITAL AND HEALTH CARE EMPLOYEES
UNION, R.W.D.S.U., AFL-CIO,

Respondents,

against

PAUL MAGGIO d/b/a Patchogue Nursing Center,

Petitioner.

**Brief of the New York State Health Facilities Association, Inc.
Amicus Curiae, in Support of Petition for a Writ of
Certiorari to the United States Court of Appeals for the
Second Circuit**

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**Brief of the New York State Health Facilities Association,
Inc. *Amicus Curiae*, In Support of Petition for a Writ of
Certiorari to the United States Court of Appeals for the
Second Circuit**

Statement of Interest

This *Amicus Curiae* Brief is submitted on behalf of the New York State Health Facilities Association, Inc. ("NYSHFA") in support of the Petition by Paul C. Maggio d/b/a Patchogue Nursing Center for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. All of the parties to this litigation have been advised of NYSHFA's intent to file this Brief and all parties have consented to its submission.

NYSHFA is a not-for-profit corporation whose membership consists of over two hundred thirty long term care residential health care facilities throughout the State of New York. These facilities render "skilled nursing facility" or "intermediate care facility" services as defined in the federal Medicaid Act (42 U.S.C. §1396 *et seq.*) to some 35,000 sick, elderly and infirm patients. The employees of these facilities provide intensive nursing and physical care to patients who are unable to care for themselves.

NYSHFA has a significant and substantial interest in the outcome of the instant litigation. Many of its member residential health care facilities have collective bargaining agreements, governed by the Labor Management Relations Act (29 U.S.C. §141 *et seq.*), that address a facility's ability to terminate unionized employees, among whom are employees that have been found guilty of patient abuse, neglect or mistreatment under procedures embodied in the Public Health Law of the State of New York. The disposition of the case will affect these unionized facilities' ability to satisfy their federal and state statutory duties to provide qualified personnel and to protect their patients from abuse, neglect or mistreatment.

Summary of Argument

In recognition of the vulnerable status of patients residing in residential health care facilities, federal and state law has been enacted to protect these patients from abuse, neglect and mistreatment. Specifically, the New York State Legislature, in order to restore the public's confidence in its ability to protect the elderly and infirm, vested the Commissioner of the New York State Department of Health ("Commissioner") with the authority to investigate and determine all alleged incidents of patient abuse, neglect or mistreatment. It would defeat this clear public policy, as well as place the operators of residential health care facilities in an untenable situation where they may be found to be in violation of their federal and state statutory duties to protect their elderly patients, if a labor arbitrator can make independent factual findings concerning alleged incidents of patient abuse, neglect or mistreatment inconsistent with findings already made by state authorities acting pursuant to a procedure under state law which gives the person charged a full opportunity to contest the charges in a due process, evidentiary hearing.

It is *not* NYSHFA's position that the law of New York State vesting the Commissioner with the authority to investigate and determine suspected incidents of patient abuse, neglect or mistreatment divested the labor arbitrator of his power to fashion an award. Rather, it is NYSHFA's position that the well-defined legislative policy of the State of New York and the federal government divested the labor arbitrator of the power to make *independent factual findings* concerning the suspected patient abuse, neglect or mistreatment. The labor arbitrator retained the authority to fashion an appropriate rational award based on the Commissioner's findings.

Accordingly, the novel and significant question of federal law presented by the instant case is:

Whether, as a logical extension of the *United Paperworkers Intern. Union v. Misco, Inc.* (484 U.S. 29 [1987]) standard, a labor arbitrator, acting pursuant to a collective bargaining agreement governed by the Labor Management Relations Act, is divested of his authority to make independent factual findings regarding patient abuse when there is a dominant and well-defined policy vesting such authority in the hands of a State Commissioner uniquely situated to protect the interests of third parties, namely, the sick, elderly and infirm patients of residential health care facilities.

ARGUMENT

The instant case presents a novel and significant question of federal law involving the authority of a labor arbitrator, acting pursuant to a collective bargaining agreement governed by the Labor Management Relations Act, to make independent factual findings exonerating a nursing home employee of patient abuse at variance with findings of abuse already made by a State Commissioner charged with the statutory duty to protect nursing home patients under a procedure that affords the employee the right to a due process, evidentiary hearing

Although courts generally will not review the merits of arbitration awards (see *United Steel Workers of Am. v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 [1960]), it is well established that an exception to this rule exists when the issue submitted, or the award fashioned, conflicts with public policy (see *Hurd v. Hodge*, 334 U.S. 24, 34-35 [1948]). Resolution of the public policy question resides with the courts and, recently, in *United Paperworkers Intern. Union v. Misco, Inc.* (484 U.S. 29 [1987]), the United States Supreme Court articulated the standard to be applied:

[A] court's refusal to enforce an arbitrator's *interpretation* of such [collective bargaining agreement] is limited to situations where the contract as interpreted would violate "some explicit public policy" that is "well defined and dominant and is to be ascertained by 'reference to the laws and legal precedents and not from general considerations of supposed public interests.' "

(*Id.* at 43 [quoting *W. R. Grace and Co. v. Rubber Workers*, 461 U.S. 757, 766 (quoting *Muschany v. United States*, 324 U.S. 49, 66 [1945])]).

Here, the *Misco* standard was satisfied, because the New York State Legislature, in order to protect patients residing in residential health care facilities, vested the Commissioner of Health with the exclusive authority to investigate and determine alleged incidents of abuse, neglect or mistreatment (cf., *Walters v. Fullwood*, 675 F. Supp. 155, 162 [SDNY 1987] [Chief Judge Briant emphasized that the New York Legislature has "spoken on the subject"]; see also *Matter of Estate of Walker*, 64 N.Y.2d 354, 359, 476 N.E.2d 298, 301, 486 N.Y.S.2d 899, 902 [1985] ["(W)hen we speak of the public policy of the state, we mean the law of the state, whether found in the Constitution, the *statutes* or judicial records" (emphasis added)]).

By the early 1970's, public confidence in New York State's ability to protect "its most defenseless citizens, the aged and infirmed," had been destroyed (see Governor's Memorandum, McKinney's 1975 Session Laws of New York, at 1764-1765). To restore the public's confidence, and to provide protection for the aged and infirmed, the Legislature enacted a series of statutes.

The cornerstone of the legislation passed to redress this problem was Public Health Law §2803-c. This statute, commonly referred to as the "Patient's Bill of Rights," guarantees a myriad of rights including a patient's right to be "free from mental and physical abuse" (N.Y. Pub. Health Law §2803-c[3][h] [McKinney's 1985]) and the right "to receive courteous, fair and respectful care and treatment" (N.Y. Pub. Health Law §2803-c[3][g] [McKinney's 1985]; *see also* N.Y. Comp. Code R. & Reg. tit. 10, §730.17[a][7] [1981]; N.Y. Comp. Code R. & Reg. tit. 10, §414.14 [1987]). Operators of health care facilities are duty bound to adhere to these rights, and failure to do so is punishable by a fine of up to \$1,000 per day (*see* N.Y. Comp. Code R. & Reg. tit. 10, §732.1 [1984]; N.Y. Comp. Code R. & Reg. tit. 10, §414.18 [1982]). Concomitantly, operators of residential health care facilities are required to provide "qualified personnel . . . as are necessary to assure the health, safety, proper care and treatment of the patients" (N.Y. Comp. Code R. & Reg. tit. 10, §414.17[a] [1982]). Violation of this duty is punishable by a maximum fine of \$750 per day (*see* N.Y. Comp. Code R. & Reg. tit. 10, §414.18 [1982]).

The New York State Legislature, expressly finding that patients at residential health care facilities were still not receiving adequate protection, enacted Public Health Law §2803-d in 1977 (*see* 1977 N.Y. Laws 900, section 1). This statute places an affirmative duty on certain persons, including operators and employees of residential health care facilities, to report to the Department of Health any suspected incident of patient abuse, neglect or mistreatment (N.Y. Pub. Health Law §2803-d[1] [McKinney's 1985]). Once a suspected incident is reported, as was the case here, the Commissioner is mandated to investigate the suspected incident, and to make a written determination as to whether the abuse, neglect or mistreatment had indeed

occurred (N.Y. Pub. Health Law §2803-d[6][a] [McKinney's 1985]). The employee charged with the abuse has a full and fair opportunity to contest the charges before the Commissioner in a due process, evidentiary hearing (N.Y. Pub. Health Law §2803-d[6][d]).

Paralleling this body of state law is a recent expression of federal legislative intent. On December 22, 1987, the Omnibus Budget Reconciliation Act of 1987, Public Law 100-20 ("OBRA"), was enacted, wherein strict requirements ensuring the protection of Medicaid and Medicare patients was established (*see* 42 U.S.C. §1395i-3). The panoply of rights set forth in OBRA include a skilled nursing facility patient's "right to be free from physical or mental abuse" (42 U.S.C. §1951i-3[c][1][A][ii]). Federal regulation requires that a facility must establish written policies protecting the rights of its patients so as to guarantee that each patient "is treated with consideration, respect and full recognition of his dignity and individuality" (42 C.F.R. §405.1121[k][9]). A facility operator's failure to comply with this federal, statutory and regulatory scheme, such that a patient's health or safety is immediately jeopardized, results in the Secretary for Health and Human Services (1) immediately appointing temporary management, or (2) terminating the facility's Medicare or Medicaid participation (42 U.S.C. §1395i-3[h][2][A][ii]).

The statutory scheme outlined above, leads inexorably to the conclusion that the New York State Legislature has vested the Commissioner of the Department of Health with the sole authority to make factual determinations regarding patient abuse. An example brings this conclusion clearly into focus.

Consider that a nurse's aide is alleged to have sexually molested and beaten a patient of a residential health care

facility. Pursuant to Public Health Law §2803-d, the alleged abuse is reported to the Commissioner. After an investigation, the Commissioner ultimately determines that the nurse's aide did molest and beat the patient. At the same time, pursuant to a collective bargaining agreement, an arbitrator is about to decide whether the same incidents are grounds for termination of the nurse's aide's employment. If the arbitrator is permitted to make his own findings, it is conceivable that the arbitrator may find that the nurse's aide did not molest or beat the patient and, therefore, the arbitrator would require the facility to reinstate the nurse's aide. The residential health care facility would then be required to reinstate an employee who had been found by the Department of Health to have sexually molested and beaten a patient. Such a result would do violence to the statutory scheme established by the United States and New York State Legislatures. The interests of a vulnerable class of persons—residents of nursing homes—would be disregarded.

Upon reinstatement of the nurse's aide, the operator of the facility would be subject to significant daily fines for violation of his duty to both provide "qualified personnel" and to protect patients from further abuse. This threat of inconsistent findings, coupled with the statutory expression of public policy vesting the Commissioner of the Department of Health with the exclusive authority to investigate and determine whether alleged incidents of abuse had occurred, constitutes a dominant and well-defined public policy divesting arbitrators of the power to make findings regarding alleged incidents of abuse of patients residing in residential health care facilities (*cf.*, *Local One, Amalgamated Lithographers of Am. v. Stearns & Beale*, 812 F.2d 763, 769 [2d Cir. 1987]; *Matter of Cohoes City School Dist. v. Cohoes Teachers Assn.*, 40 N.Y.2d 774, 777-778, 358 N.E.2d 878, 880-881, 390 N.Y.S.2d 53, 55-56 [1976]).

The courts below misapprehended the nature of this public policy when they concluded that the arbitrator was not bound by the Commissioner's findings. Allegations of abuse and the protection of nursing home residents are not merely private matters (*cf. American Safety Equip. Corp. v. Maguire*, 391 F.2d 821, 826 [2d Cir. 1968]). Residents of nursing homes are a vulnerable class of persons often dependent upon others for vindication of their rights and protection of their bodily integrity.

Here, Petitioner Maggio and Respondent Local 1199 are not the only entities interested in the outcome of the arbitration proceeding. Indeed, the most interested parties are those persons who reside in Patchogue Nursing Center, including patients who are recipients of Federal Medicaid and Medicare assistance.

In order to protect residents of residential health care facilities from abuse, the United States and New York State Legislatures established a comprehensive statutory scheme, including the New York statute requiring that all incidents of suspected abuse must be reported to the Commissioner. The Commissioner is then obligated to investigate the allegations and make findings. The New York State Legislature purposefully reposed this duty in the Commissioner because he is uniquely situated to act as the guarantor of resident safety.

It is not the position of NYSHFA that a labor arbitrator, acting pursuant to an agreement governed by the Labor Management Relations Act, is divested of jurisdiction over employee terminations based upon abuse of residents. The arbitrator retains jurisdiction to fashion an appropriate rational award based upon the Commissioner's findings.

In the instant case, the arbitrator reached findings inconsistent with the Commissioner's findings. Significantly, the Commissioner found that employee Ackley intentionally elbowed patient Leon Cootner and intentionally pushed patient Florence Cattani against the wall and held the strings of her restraints. The arbitrator based his award upon his determination that these intentional acts of abuse had not occurred. For this reason, Local 1199's reliance on *Local 453, Int'l Union of Elec. Radio & Machine Workers v. Otis Elevator Co.* (314 F.2d 25 [2d Cir.], cert den 373 U.S. 949 [1963]) is misplaced. In *Local 453*, the arbitrator's findings of fact were consistent with the findings made by the court. Moreover, an operator's duty to provide "qualified personnel" is inextricably linked to his duty to protect patients from abuse, neglect or mistreatment. It is hardly speculative to expect that an operator may be held to have violated his duty to employ "qualified personnel" if he must reinstate an employee found by the Commissioner to be a patient abuser.

Therefore, if it is accepted—that Public Health Law §2803-d, and federal and state public policy divested the arbitrator of the authority to make independent factual findings regarding the occurrence or non-occurrence of patient abuse—the arbitrator's award must be vacated.

Conclusion

The Petition for a Writ of Certiorari should be granted.

Dated: October 26, 1989

Respectfully submitted,

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